

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF DELAWARE

3

4 XPERTUNIVERSE, INC., ) Trial Volume 9  
5 Plaintiff, )  
6 v. ) C.A. No. 09-157 (RGA)  
7 )  
8 CISCO SYSTEMS, INC., )  
9 Defendant. )

10 Friday, March 22, 2013  
11 11:55 a.m.  
12 844 King Street  
13 Wilmington, Delaware

14 BEFORE: THE HONORABLE RICHARD G. ANDREWS  
15 United States District Court Judge

16 APPEARANCES:

17 POTTER ANDERSON & CORROON, LLP  
18 BY: PHILIP A. ROVNER, ESQ.

19 -and-

20 STROOCK & STROOCK & LAVAN  
21 BY: CHARLES E. CANTINE, ESQ.  
22 BY: JASON SOBEL, ESQ.  
23 BY: CLAYTON McCRAW, ESQ.

24 Counsel for the Plaintiffs

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2 APPEARANCES CONTINUED:

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4 MORRIS NICHOLS ARSHT & TUNNELL, LLP  
5 BY: JACK B. BLUMENFELD, ESQ.

6 -and-

7 MORGAN LEWIS & BOCKIUS, LLP  
8 BY: BRETT M. SCHUMAN, ESQ.  
9 BY: KELL M. DAMSGAARD, ESQ.

10 Counsel for the Plaintiffs

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## PROCEDURE

(Proceedings commenced in the courtroom, beginning at 11:55 a.m.)

THE COURT: All right. Please be

I'm advised that the jury has a verdict. And I would just ask that whatever the verdict is, that the audience be restrained.

So we'll go get the jury. All

Is there something, Mr. Cantine?

MR. CANTINE: Before we do, your Honor, I just wanted to, one more time in the event they find liability for fraud, we think punitives should go to the jury.

Whether Mr. Hernandez is a managing agent is an issue of fact for the jury to decide. Whether he had effect over corporate policy of the type likely to come to the attention of upper management is for the jury to decide.

THE COURT: But there is no

1 evidence on that.

2 MR. CANTINE: There is, your  
3 Honor. We cited to the case. Even if you don't  
4 think --

5 THE COURT: No. I agree Mr. Sobel  
6 found a good case, but even taking into account  
7 what happened in the defense case, there's no  
8 evidence.

9 MR. CANTINE: All right. Well, we  
10 respectfully disagree, and we think that there  
11 is substantial prejudice to our client if you're  
12 reversed on appeal and we have to come back and  
13 do this all over again rather than simply asking  
14 the jury to spend ten more minutes and make one  
15 more decision.

16 THE COURT: All right. Thank you.

17 MR. CANTINE: Thank you.

18 THE COURT: All right. Can we go  
19 get the jury, please.

20 (The jury entered the courtroom  
21 and took their seats in the box.)

22 THE COURT: Welcome back, Members  
23 of the Jury. You may be seated.

24 Madam foreperson, has the jury

1                   reached a verdict?

2                   JURY FOREPERSON: We have.

3                   THE COURT: And I'm going to ask  
4                   if you hand the written verdict to my deputy  
5                   clerk, please.

6                   (Pause.)

7                   THE COURT: All right. Members of  
8                   the Jury, my deputy clerk is going to announce  
9                   the verdict, meaning, in other words, it will be  
10                  read aloud, and I would just instruct you to pay  
11                  close attention to make sure that what the  
12                  deputy clerk reads is, in fact, what you believe  
13                  or what you have agreed to as a verdict.

14                  And so would you please announce  
15                  the verdict.

16                  DEPUTY CLERK: Fraudulent  
17                  concealment.

18                  Did XpertUniverse prove, by a  
19                  preponderance of the evidence, that Cisco  
20                  committed fraud by concealment?

21                  Yes.

22                  What damages do you find  
23                  XpertUniverse has proven by a preponderance of  
24                  the evidence it should recover for its loss that

1 was caused by Cisco's fraud by concealment?

2 70 million.

3 Infringement of XpertUniverse's  
4 patents.

5 Did XpertUniverse prove, by a  
6 preponderance of the evidence, that Cisco  
7 infringed claim 5 of the U.S. Patent No.  
8 7,366,709?

9 Expert Advisor: Yes.

10 Pulse: No.

11 Did XpertUniverse prove, by a  
12 preponderance of the evidence, that Cisco  
13 infringed claim 12 of U.S. Patent No. 7,499,903?

14 Expert Advisor: Yes.

15 Remote Expert: Yes.

16 Validity of XpertUniverse's  
17 patents.

18 Did Cisco prove, by clear and  
19 convincing evidence, that claim 5 of U.S. Patent  
20 No. 7,366,709 is invalid due to anticipation?

21 No.

22 Did Cisco prove, by clear and  
23 convincing evidence, that claim 5 of U.S. Patent  
24 No. 7,366,709 is invalid due to obviousness?

1 No.

2 Did Cisco prove, by clear and  
3 convincing evidence, that claim 12 of U.S.  
4 Patent No. 7,499,903 is invalid due to  
5 anticipation?

6 No.

7 Did Cisco prove, by clear and  
8 convincing evidence, that claim 12 of U.S.  
9 Patent No. 7,499,903 is invalid due to  
10 obviousness.

11 No.

12 Damages for Cisco's patent  
13 infringement.

14 What damages do you find  
15 XpertUniverse has proven by a preponderance of  
16 the evidence it should recover for Cisco's  
17 infringement of XpertUniverse's patents?

18 Expert Advisor, \$15,463.

19 Pulse, zero.

20 Remote Expert, \$18,920.

21 THE COURT: Are there any  
22 requests?

23 MR. CANTINE: Not from the  
24 plaintiff, your Honor.

1 MR. SCHUMAN: No, your Honor.

2 THE COURT: All right. Then I  
3 would ask that my deputy clerk file and record  
4 the verdict.

5 Members of the Jury, your job is  
6 done. In a minute I'm going to ask the deputy  
7 clerk to take you out.

8 I think the parties said during  
9 their closing arguments that they very much  
10 appreciated your service. I, too, appreciate  
11 your service. It's what makes this system  
12 work.

13 And as I mentioned one or twice  
14 during the trial, you have been a very attentive  
15 jury. After hours of sometimes difficult  
16 testimony, I would still see you following the  
17 witnesses, follow what was up on the screen, so  
18 you really have done a great service for your  
19 community.

20 The other thing I would ask is,  
21 when you go back to the jury room, if you would  
22 just wait one minute because I want to come back  
23 and speak to you for a second. All right?

24 Can we take the jury out, please.

1 (The jury was excused.)

2 THE COURT: All right. So what  
3 I'd like to do is, I would like to take a brief  
4 recess and for you to hang around, and when I  
5 get back, we'll talk about, you know, what's  
6 going to happen next? All right.

7 MR. CANTINE: Thank you, your  
8 Honor.

9 (Short recess taken.)

10 - - -  
11 (Proceedings resumed after the  
12 short recess.)

13 THE COURT: All right. So what is  
14 it that we could usefully address at this point?

15 MR. SCHUMAN: Your Honor, I think  
16 there are at least a few issues remaining.

17 First, I think the applicability  
18 of the limitation of liability clauses in the  
19 two technology developer agreements is still --  
20 needs to be briefed and decided.

21 The technology developer  
22 agreements were the foundation for a potential  
23 SolutionsPlus agreement. Obviously, at summary  
24 judgment, the Court rejected --

1 THE COURT: I know what you are  
2 talking about. I know what the issue is.

3 MR. SCHUMAN: I think we need a  
4 briefing schedule on that. There's a contention  
5 from the plaintiffs that the limitation of  
6 liability clause does not apply to the claim  
7 that the jury has found in their favor on, so I  
8 would ask for a couple of weeks to file an  
9 opening brief on that and have a briefing  
10 schedule.

11 THE COURT: All right. Before we  
12 start getting nuts and bolts, let's get the full  
13 agenda.

14 MR. SCHUMAN: I think we have  
15 inequitable conduct claims regarding the  
16 patents.

17 There are a couple of different  
18 bases for inequitable conduct pleaded in the  
19 counterclaims that need to be decided on the  
20 patent side.

21 THE COURT: You know, I remember  
22 at this point that there were inequitable  
23 conduct claims. I remember I struck some of  
24 them, but I didn't strike others of them.

1 I'm not looking for my argument.

2 What was -- what is a general, briefly, in much  
3 of a nut as you can, what is the general  
4 inequitable conduct theory?

5 MR. SCHUMAN: I don't recall any  
6 of them being stricken, your Honor, but there  
7 were about six or seven different bases. And it  
8 is the -- the lack of any disclosure to the PTO  
9 in the prosecution of either of the two asserted  
10 patents regarding any of the -- any prior art  
11 actually at all.

12 There were no disclosures named at  
13 all, and as well as in some of the -- some of  
14 those patents were brought to XpertUniverse's  
15 attention by IP Capital, and the -- the  
16 information that was brought to XpertUniverse's  
17 attention by IP Capital regarding the prior  
18 activities, the offers to sell, et cetera, with  
19 respect to KnowledgeSHARE and XpertSHARE. And,  
20 you know, I have not completely thought through  
21 at this point, your Honor, what the impact of  
22 the jury's verdict is on that claim.

23 THE COURT: Okay. And on  
24 inequitable conduct, is it your theory that

1 we're going to need to have a hearing?

2 MR. SCHUMAN: We may, your Honor.

3 THE COURT: Okay. All right.

4 What else?

5 MR. SCHUMAN: The only other  
6 request, your Honor, is I think, we, of course,  
7 timely filed the Rule 50 motion.

8 The brief was put together where  
9 there was a lot of other activity going on. If  
10 the Court would permit us leave to go back and  
11 look at that brief and possibly file another  
12 brief, that would be appreciated.

13 THE COURT: You know, it has been  
14 sitting in my in-box and I saw that there was a  
15 brief given. I didn't read it.

16 Was that a brief in connection  
17 with, again, the plaintiff's case or in  
18 connection with at the end of the defendant's  
19 case, or which -- which JMOL was that in  
20 relation to?

21 MR. SCHUMAN: The former. At the  
22 end of the plaintiff's case.

23 THE COURT: Okay. All right. So  
24 we just have a general JMOL situation. Is that

1 it for your agenda items?

2 MR. SCHUMAN: I think so, your  
3 Honor.

4 THE COURT: All right.

5 MR. SCHUMAN: Well --

6 MR. BLUMENFELD: Your Honor, I  
7 think procedurally, the motion that we make now  
8 is a Rule 50(b) motion as opposed to a Rule  
9 50(a) motion, and there undoubtedly will also be  
10 a motion for a new trial under Rule 59.

11 THE COURT: Okay. I was kind  
12 of -- in the agenda, I was kind of putting all  
13 the post-trial motions together.

14 MR. BLUMENFELD: Right.

15 THE COURT: Mr. Cantine?

16 MR. CANTINE: Obviously, your  
17 Honor, we do not believe the limitation of  
18 liability clause applies.

19 THE COURT: Right. Right. I  
20 assumed you were going to oppose that and oppose  
21 inequitable conduct.

22 MR. CANTINE: Yes.

23 THE COURT: And oppose the JMOL  
24 and the new trial.

1 MR. CANTINE: Correct. And we  
2 want the opportunity to file our own Rule 50  
3 motion.

4 THE COURT: Okay.

5 MR. CANTINE: So I think those  
6 would be the -- I'm sorry.

7 MR. ROVNER: Our 50(a) motion was  
8 made, but we never briefed it.

9 MR. CANTINE: Right.

10 THE COURT: Okay. You know, I  
11 mean, in the middle of trial, I don't expect  
12 people to be briefing motions. I just don't.  
13 If they do, that's nice.

14 So all right. So how -- how  
15 procedurally do you want to do this? Do you  
16 want to basically say that we'll have some --  
17 well, I guess some of these post-trial motions  
18 that may get made may be made in writing and  
19 they're going to have a time limit of their own  
20 by which they'll be made. Let's put that aside.

1 they're going to brief and go first. And  
2 thinking for all -- all of your motions put  
3 together, Mr. Schuman, how many pages do you  
4 think you need?

5 MR. SCHUMAN: Your Honor, I think  
6 20 pages is sufficient on the applicability of  
7 the limitation of liability clause. I don't  
8 think we need to exceed page limits on that.

22 MR. SCHUMAN: I think you gave us  
23 40 pages on the summary judgment that was read.

24 THE COURT: I did.

1 MR. SCHUMAN: I think we could  
2 probably put them together in that 40, 40, 20.

6 MR. SCHUMAN: Well, I want to keep  
7 the limitation of liability issue separate, if  
8 that's okay, which I think we can do in a  
9 20-page brief. In other words, under the normal  
10 briefing rules and then these other motions, 40,  
11 40, 20.

12 THE COURT: And do you want to do  
13 the inequitable conduct?

14 MR. SCHUMAN: I think inequitable  
15 conduct is separate and I think a 20-page brief  
16 there. As I said, I would like to go back and  
17 look at the claims.

18 THE COURT: Okay. So I've got  
19 your request at 20, 20, 10 on the limitation of  
20 liability. Inequitable conduct, 20, 20, 10,  
21 though you have to refresh yourself on exactly  
22 what those claims are. The JMOLs for your side  
23 I got the request of 40, 40, 20, and I'm  
24 including the JMOL motion for new trial.

3 MR. CANTINE: I think for our  
4 50(a) motion, your Honor, we ought to have, it  
5 seems like the 40, 40, 20 would apply. 50(b).  
6 I'm sorry.

10 MR. ROVNER: Your Honor, the  
11 procedural posture is that the plaintiffs timely  
12 moved for, under 50(a), at the close of our  
13 case, they submitted a brief in support, their  
14 formal motion. We made a 50(a) motion at the  
15 end of the defense case. We have not briefed  
16 that yet.

17 I think in some respects the 50(a)  
18 motions are moot now that the jury has come  
19 back. I would recommend we just proceed with  
20 50(b) motions.

1 that I can't do anything with other than -- that  
2 I can't do anything with.

3 So -- but basically, Mr. Cantine,  
4 all of your briefing, all the issue you  
5 anticipate raising could be, in your opinion,  
6 dealt with 1, 40, 40, 20 briefing.

7 MR. CANTINE: Correct, your Honor.

8 THE COURT: All right. So leaving  
9 aside the page limits, when would you all like  
10 to have the opening briefs due?

11 MR. CANTINE: 30 days.

12 THE COURT: I mean, there's no  
13 urgency.

14 MR. CANTINE: Okay.

15 THE COURT: So I mean don't --  
16 pick the time frame you would like to have.

17 MR. CANTINE: I'd like 45 days.

18 THE COURT: Okay.

19 MR. CANTINE: I need 15 days to  
20 rest.

21 THE COURT: Yes. I'm not  
22 necessarily opposed to that.

23 Mr. Schuman?

24 MR. SCHUMAN: That's fine with us,

1 your Honor.

2 THE COURT: Okay. Well, so, then,  
3 opening briefs will be due 45 days from today.  
4 If that turns out to be a weekend, then the  
5 Monday or whatever the first business day is  
6 after that.

7 How long would you all like to  
8 respond to each other's briefs?

9 MR. CANTINE: 30 days.

10 MR. SCHUMAN: That's fine your  
11 Honor.

12 THE COURT: All right. Hold on.  
13 Okay.

14 And reply briefs?

15 MR. CANTINE: 20 days?

16 THE COURT: How about -- you know,  
17 how about 15 days?

18 MR. CANTINE: That's fine.

19 THE COURT: All right. Okay. So  
20 we've got a schedule there.

21 And do you think, Mr. Schuman,  
22 that whatever briefing you submit on inequitable  
23 conduct, even if I gave it the most possibly  
24 charitable interpretation to you, do you think

1 that it's likely that I would be able to rule in  
2 your favor without having a hearing?

3 MR. SCHUMAN: I don't know.

4 THE COURT: Okay. I guess  
5 actually, do you expect, Mr. Cantine, and I  
6 realize you may not have put on  
7 inequitable conduct for awhile either, do you  
8 think if there's briefing on that, I'm going to  
9 be able to rule in your favor based just on the  
10 briefing or do I need a hearing?

11 MR. CANTINE: Not having thought  
12 it through all the way, I think you could  
13 probably rule on paper on that. Certainly, I  
14 can think of one of their grounds was whether  
15 this guy David Rutberg should have been named as  
16 an inventor. We put in evidence, his own  
17 testimony he wasn't an inventor. I don't think  
18 we need a hearing on that.

19 THE COURT: I think that was  
20 pretty conclusory.

21 MR. CANTINE: We're a little bit  
22 pressed for time.

23 THE COURT: But my point is,  
24 because one of the things was, actually, that

1 was one of the slightly discordant notes. I  
2 remember the first time you asked was Rutberg an  
3 inventor and somebody no, why is he asking that?  
4 And then you did have the video and there I  
5 understood it to be, oh, well, his opinions  
6 don't count. He's really not an inventor.

7 I understood why you were asking  
8 him or it was played during the video, but I  
9 think in terms of giving me any meaningful input  
10 as to whether or not he is or isn't an inventor,  
11 that's pretty much a zero.

12 MR. CANTINE: But, again, I think  
13 we could marshal that evidence in a brief rather  
14 than having a hearing. I have not thought  
15 through all the other ones.

16 THE COURT: Well, why don't we do  
17 this, because I will let you brief the  
18 inequitable conduct. I'm thought it may easily  
19 be the case that when I see the briefs, that I'm  
20 going to say it's not worth struggling through  
21 these briefs. Let's just have a hearing, and  
22 whatever you all think is germane we can put it  
23 on, because I do tend to think I could rule in  
24 your favor on the briefing, depending on how

1 it's presented. It would be shocking to me if I  
2 could rule in Cisco's favor just on the  
3 briefing.

4 But -- so okay. So I'm probably  
5 going to live to regret this, but why don't you  
6 submit your 40, the schedules that you proposed.

7 Yes, Mr. Rovner?

8 MR. ROVNER: I didn't want to  
9 interrupt. I can wait.

10 THE COURT: No. No. Interrupt  
11 me.

12 MR. ROVNER: Okay. One thing that  
13 we did not address is a motion for fees. And I  
14 know under the statute, under the Federal Rules,  
15 that we have either 14 or 21 days after you  
16 enter the verdict, and so I want to make sure  
17 that the briefing schedule that you've allowed  
18 for 45 days preserves our right, because I don't  
19 want to waive that, when it says 14 or 21 days.

20 Under the Federal Rules I think we  
21 have 14 or 21 days after entry of a verdict to  
22 file a motion for fees.

23 THE COURT: Right. I heard you.  
24 I was going to say, you know, I don't know how

1 many days you have.

2 MR. ROVNER: I know it's less than  
3 45. I want to make sure we preserve that.

4 THE COURT: If you need to do some  
5 motion to preserve some right, go ahead and do  
6 the motion. But it strikes me -- when you say  
7 "Fees," what kind of thing? The clerk awards?

8 MR. ROVNER: Costs we can defer  
9 until after the appellate process, assuming  
10 there is one, but fees, that does not get  
11 stayed.

12 What I would suggest is to file  
13 a -- file a motion within the time provided, but  
14 then we brief it under the schedule that you've  
15 suggested.

16 THE COURT: All right. That's  
17 okay. All right. In any event, what we're  
18 discussing, that's without prejudice to either  
19 side if you think of things you need to do to  
20 protect the record or do things in a timely  
21 manner. All I'm trying to do is to get a  
22 briefing schedule and to have some idea of how  
23 much paper you all are going to throw my way.

24 So we've got a schedule. We've

1       got a rough amount of paper. And I guess I will  
2       look forward to seeing all of this paper. Okay?

3                   Is there anything else you want to  
4       discuss today? Mr. Cantine?

5                   MR. CANTINE: No thanks. No.

6       Thank you, your Honor.

7                   THE COURT: Mr. Schuman?

8                   MR. SCHUMAN: No. Thank you, your  
9       Honor.

10                  THE COURT: All right. We will  
11       stand in recess.

12                  (Court recessed at 12:30 p.m.)

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